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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 468

DEBS MEMORIAL RADIO FUND INC., AND HENRY  
GREENFIELD,

Petitioners,

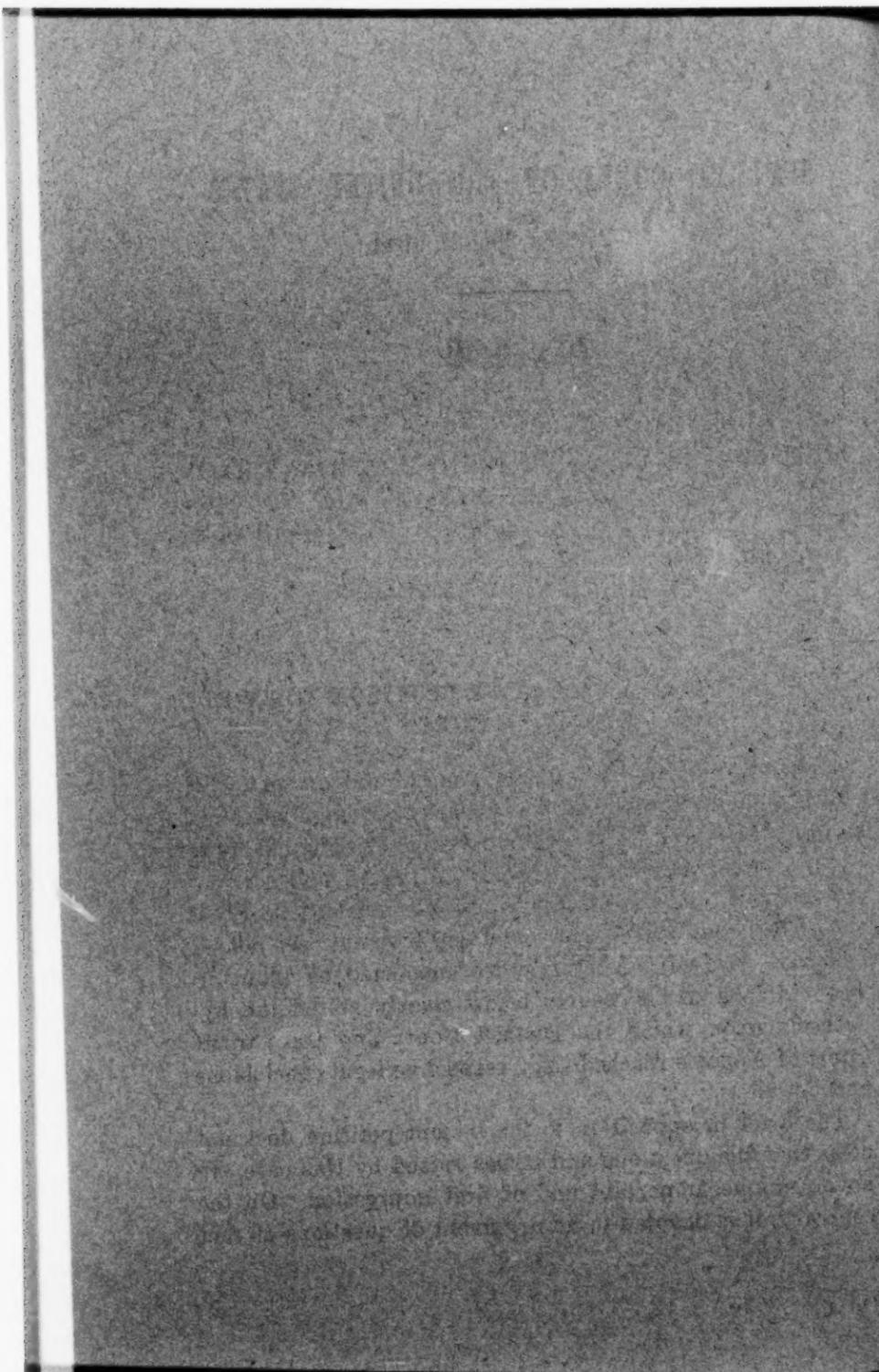
vs.

ASSOCIATED MUSIC PUBLISHERS, INC.

ON PETITION FOR WRIT OF CERTIORARI  
UNITED STATES DISTRICT COURT FOR THE  
FOR THE STATE OF CONNECTICUT

REPLY BRIEF OF THE PETITIONERS

OF THE PETITIONERS



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DEBS MEMORIAL RADIO FUND INC., AND HENRY  
GREENFIELD,

against *Petitioners,*

ASSOCIATED MUSIC PUBLISHERS, INC.

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**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI**

The judgment affirmed below was entered on an order granting summary judgment and was based upon the facts set forth in the affidavits. Petitioners' answering affidavits contain statements of fact as to the nature and conduct of the operations of petitioner Debs Memorial Radio Fund Inc. The record shows that such facts have not been denied and that no reply affidavits were submitted by plaintiff. The opinions of the courts below clearly stated the hypothesis upon which the District Court and the Circuit Court of Appeals reached their respective legal conclusions and decisions.

The brief in opposition to the instant petition does not deny that the questions and issues raised by this case are novel, unique, important and of first impression. On the contrary, it is devoted to an argument of questions of fact

which form no part of the hypothesis upon which the courts below rendered their decisions. This Court is not concerned with the review of evidence in the record or of any specific facts.

#### **Factual Hypothesis Assumed By the Courts Below**

The argument in the brief in opposition to the instant petition begs the very questions of law raised herein by petitioners. Both courts below rendered their opinions and decisions on the assumption that the test of petitioners' liability depends upon their actual operations and ultimate objects irrespective of the particular form of incorporation utilized. The Circuit Court of Appeals expressly so stated at 141 F. 2d 852, 854 and the District Judge expressly held that his decision did not depend on whether the corporate petitioner "in its general structure is a profit sharing corporation or not" (46 F. Supp. 829, 830).

In the opinion of the Circuit Court of Appeals below, the following was stated:

"Whatever may be the charter powers of Debs, we may assume that its ultimate objects, as it has been actually conducted, have been philanthropic and educational." (141 F. 2d 852, 854).

In the opinion of the District Court the issue was set forth as follows:

"The question then is whether the unlicensed broadcast of a copyrighted musical composition on a sustaining program of a non-profit station, which devotes one-third of its time to commercial broadcasts, is a performance for profit within the meaning of the Copyright Act, 17 U. S. C. A. Sec. 1(e)." (46 F. Supp. 829, 830).

Any other discussion of the evidence in the record can serve only to raise questions of fact, which are not only

improper and irrelevant, but the mere existence of such disputed facts, if they have any legal significance, would *ipso facto* warrant a denial of summary judgment and a reversal of the judgment below. Any comparison of petitioners' operations with the functions of typical commercial broadcast stations operated for profit is to assume the very point at issue here, since their respective motivations and objectives must of necessity be the controlling factors in the interpretation of the Copyright Act which this Court is asked to call before it for review.

**Reference to Debs Memorial Radio Fund Inc. v. Commissioner of Internal Revenue**

In opposition to this petition, great reliance is placed upon the case of *Debs Memorial Radio Fund Inc. v. Commissioner of Internal Revenue*, 3 T. C. (No. 6) 949. It should be noted that the cited case was decided by a divided court and the opinion of the majority of the Tax Court rested on the decision of the District Court below herein, of which review is asked in this petition. It is, therefore, circular reasoning for the plaintiff to argue that such a decision in the tax litigation, which is still in progress, should serve as authority herein when the very basis thereof is the subject of review in this Court.

**The Undenied Importance and Novelty of the Questions Presented for Review**

The brief in opposition to the instant petition avoids any discussion of and cites no authorities on the novel and important questions set forth in the petition.

Where a radio broadcast station has as its ultimate objects philanthropic and educational purposes and only one-third of its time is given to paid broadcasts, is a broadcast of a copyrighted musical composition on a sustaining pro-

gram (a non-commercial program bringing no revenue to the station) a public performance for profit within the meaning of Section 1(e) of the Copyright Act? This question is undeniably a question of first impression. It is novel, unique and important not only to petitioners, but undoubtedly to the general understanding and construction of the copyright law itself. Nothing in the brief in opposition indicates anything to the contrary.

The questions of law raised herein deal with the interpretation of Section 1(e) of the Copyright Act insofar as that Section applies to performances of copyrighted musical works by a broadcast station which has been found or assumed by the courts below to be non-profit as well as philanthropic and educational in character.

The brief in opposition misses the point of the instant petition to construe Section 1(e) by advertizing to Section 28 of the Copyright Act, which is the provision for criminal prosecutions against willful infringers. This case concerns itself solely with civil liability for copyright infringement by public performance and involves Section 1 of the statute which sets forth the rights granted to a copyright proprietor. Section 28, which exempts charitable and educational institutions from criminal liability, has no application whatsoever to the questions of law raised herein. However, even in construing said criminal provisions the Circuit Court of Appeals for the Second Circuit, in *John Church Co. v. Hilliard Hotel Co., et al.*, 221 Fed. 229, at 231 (reversed on other grounds, 242 U. S. 591) interpreted the words "for profit" in Section 28 by finding that "Congress seems to have meant by the words 'for profit' a direct pecuniary charge for the performance, such as an admission fee \* \* \*".

The reference on pages 7 and 8 of the brief in opposition to the instant petition to one of the many proposed copyright bills which was never enacted is utterly irrelevant

to the questions of law raised herein which are concerned solely with the interpretation of existing and long-enacted legislation as a matter of first impression. However, insofar as such bills may indicate a trend or tendency to allow exemptions for the performance of copyrighted works, Section 12 of S. 3043, cited on page 8 of the opposing brief, would squarely relieve petitioners of any liability for copyright infringement upon the undenied facts in this record.

It is respectfully submitted that the absence of any specific statutory exemption provision in the present Copyright Act conclusively requires an interpretation by this Court of Section 1(e) to determine its applicability to "the unlicensed broadcast of a copyrighted musical composition on a sustaining program of a non-profit station \* \* \*" (46 F. Supp. 829, 830) whose "ultimate objects, as it has been actually conducted, have been philanthropic and educational." (141 F. 2d 852, 854)

The petition for a writ of certiorari should be granted.

Respectfully submitted,  
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